

(24,524)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 330.

SEABOARD AIR LINE RAILWAY, APPELLANT,

vs.

THE CITY OF RALEIGH AND JAMES I. JOHNSON, O. G.
KING, AND R. B. SEAWELL, COMMISSIONERS OF THE
CITY OF RALEIGH.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF NORTH CAROLINA.

INDEX.

	Original.	Print
Caption	a	1
Bill of complaint.....	1	1
Prosecution bond	10	7
Subpoena and return.....	11	8
Notice of application for injunction.....	13	9
Injunction	15	10
Notice of hearing.....	17	11
Order continuing injunction.....	18	12
Answer	19	12
Agreed statement of facts.....	24	15
Additional statement of facts.....	27	17
Opinion, Connor, J.....	28	18
Final decree	43	26
Bill of exceptions.....	44	27

	Original.	Print
Judge's certificate to bill of exceptions.....	44	27
Judge's certificate to bill of exceptions.....	50	31
Order signing and settling bill of exceptions.....	51	31
Petition for appeal.....	52	32
Order allowing appeal.....	53	32
Order restoring injunction during pendency of appeal.....	54	33
Assignment of errors.....	56	34
Bond on appeal.....	64	38
Citation and service.....	66	40
Order designating record on appeal.....	68	41
Order transmitting record on appeal.....	69	41
Clerk's certificate	70	42

a UNITED STATES OF AMERICA,

Eastern District of North Carolina, To wit:

At a District Court of the United States for the Eastern District of North Carolina, Begun and Held at the Court-house in the City of Raleigh, on the 23 Day of November, A. D. Nineteen Hundred and Fourteen (1914).

Present: The Honorable Henry G. Connor, Judge of the District Court for the Eastern District of North Carolina.

Among others were the following proceedings, to-wit:

1 Filed June 27th, 1913.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Bill of Complaint.

The Seaboard Air Line Railway brings this, its bill of complaint, against the City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of the city of Raleigh, and complains and says:

1. That the complainant, Seaboard Air Line Railway, is a corporation created and existing under the laws of the States of Virginia, North Carolina and other States, and having its principal place of business in the city of Portsmouth, in the State of Virginia, and owning and operating a line of railroad extending into and through the State of North Carolina, and doing the general business of a common carrier in the transportation of freight and passengers in and through said State, and a large portion of said business is interstate transportation.

2. That the defendant, City of Raleigh, is an incorporated town in the State of North Carolina, in the Eastern District thereof; and the defendant James I. Johnson, a citizen and resident of said City is Mayor and Commissioner of Finance of the City of Raleigh, and the defendant, O. G. King, a citizen and resident of said City, is Commissioner of Public Safety of the City of Raleigh, and the defendant R. B. Seawell, a citizen and resident of said city, is Commissioner of Public Works of the City of Raleigh, and the said Commissioners constitute the governing body of said

City, with authority granted by law to enact and enforce ordinances for the government of said city and for the control of its property.

3. That the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand (\$3,000.00) Dollars, and arises under the Constitution of the United States.

4. That by an act of the General Assembly of North Carolina, at its Session of 1835 (2 Revised Statutes, page 299) the Raleigh & Gaston Railroad Company was incorporated for the purpose of effecting a communication by railroad from some point in or near the City of Raleigh to the termination of the Greenville and Roanoke Railroad at or near Gaston, and for providing everything necessary and convenient for the purpose of transportation on the same; and the President and Directors of said company were invested with all the rights and powers necessary for the construction, repair and maintaining of a railroad, to be so located, with as many sets of tracks as they or a majority of them should deem necessary; and the President and Directors of said Company were authorized to cause to be made and to make and continue all tracks whatever necessary and expedient in order for the proper completion of said railway.

5. That acting under the charter granted by the General Assembly of North Carolina the incorporators of the Raleigh & Gaston Railroad Company constructed and operated a line of railroad from Raleigh, North Carolina, to Gaston, North Carolina, and constructed in the City of Raleigh terminals and depots for the receipt and delivery of freight and passengers, and constructed in the said City on Halifax Street, between Lane and North Streets, a freight depot and warehouse, extending from Halifax Street back to Salisbury Street, and constructed its tracks from the main line of the Raleigh & Gaston Railroad across Salisbury Street into said depot and warehouse.

6. That about the year 1881 a cotton compress was constructed on a lot in the City of Raleigh bounded by Salisbury, Jones, Halifax and Lane Streets, and in order to receive cotton from and deliver cotton to said compress, and in order to serve the patrons of said railroad and to furnish the public facilities for the receipt and delivery of freight in carload lots, and in order to better perform its functions as a common carrier, the Raleigh & Gaston Railroad Company made application to the Board of Aldermen of the City of Raleigh for the grant of the right, privilege and franchise to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of constructing thereon a track.

7. That by and through its Board of Aldermen, at a meeting held on August 5th, 1881, the City of Raleigh, acting under and by virtue of the laws of the State of North Carolina, and its charter, then in effect, duly passed an ordinance granting to the Raleigh & Gaston Railroad Company the right, privilege and franchise to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track as will appear from the following extract from the minutes of said meeting:

"Upon application of John C. Winder, Gen. Supt. the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track."

8. That the said ordinance was accepted by the Raleigh & Gaston Railroad Company and pursuant to the right, privilege and franchise thereby granted a track was laid at great expense to the said railroad company along the said sidewalk and from the time of its completion in 1881, to the present time, it has been constantly used by the Raleigh & Gaston Railroad Company, and its successor and
4 assign, Seaboard Air Line Railway, as a public track for the general delivery and receipt of freight for intrastate and interstate transportation, and on account of the convenience of location it has been and is now largely used by the merchants of the City of Raleigh and by the public generally and has been since its completion, and is now an important and necessary factor in the conduct of the business of the Raleigh & Gaston Railroad Company, and the Seaboard Air Line Railway as common carriers.

9. That the Raleigh & Gaston Railroad Company, acting upon the authority granted by the City of Raleigh through its Board of Aldermen, with the knowledge of the municipal authorities of said city, proceeded to exercise the right, privilege and franchise so granted, and constructed said track; and the Raleigh & Gaston Railroad Company, and its successor and assign, Seaboard Air Line Railway, have maintained and operated said track since 1881, and the City of Raleigh, by the acts and conduct of its officers and representatives in knowingly permitting and acquiescing in the use and occupation of said sidewalk, is estopped from asserting that no ordinance has been passed, or that the necessary steps have not been taken to effectuate the grant to the said Raleigh & Gaston Railroad Company of the right, privilege and franchise to use said sidewalk.

10. That under and by virtue of the laws of the State of North Carolina, the Raleigh & Gaston Railroad Company has been merged and consolidated with the Seaboard Air Line Railway; and the Seaboard Air Line Railway, as the successor and assign of said Raleigh & Gaston Railroad Company, is the owner of and entitled to all the property, rights, privileges and franchises belonging to said Raleigh & Gaston Railroad Company, including the right, privilege and franchise of maintaining and operating a track on the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, in the City of Raleigh.

11. That on June 10th, 1913, the Commissioners of the City of Raleigh, James I. Johnson, O. G. King and R. B. Seawell,
5 at a regular meeting, over the protest of the Seaboard Air Line Railway, passed the following ordinance:

"Upon the hearing of the matter of the removal of the spur track of Raleigh used by the Seaboard Air Line Railway and situated on the street and sidewalk on the east side of North Salisbury Street in the City of Raleigh, between Jones and Lane Streets, it is

"Ordered that the Chief of Police of the City of Raleigh notify the said Seaboard Air Line Railway to remove said spur track, cross

ties and rails and all other material constituting said track from said street and sidewalk within thirty days from the date of this order.

"It is further ordered that if the said Seaboard Air Line Railway shall fail to remove said spur track within the said thirty days, that the Commissioner of Public Works of the City of Raleigh be, and he is hereby authorized, empowered and directed to forthwith remove said spur track, cross ties, rails and all other material from said street and sidewalk at the cost and expense of the said Seaboard Air Line Railway.

"This 10th day of June, 1913."

A copy of the said ordinance was served on the Seaboard Air Line Railway on June 10th, 1913.

12. That by the enactment of the ordinance granting the Raleigh & Gaston Railroad Company the right to occupy the sidewalk on the east side of Salisbury Street, and by the conduct as set forth, herein, of the City of Raleigh, through its officers and representatives, and by the acceptance of said ordinance and by the construction and maintenance and use of a side track along said sidewalk for public purposes, with the knowledge and acquiescence of the municipal authorities, a valid and binding contract has been created between the City of Raleigh and the Raleigh & Gaston Railroad Company, and its successor and assign, Seaboard Air Line Railway, which is impaired by the ordinance of June 10th, 1913, in violation of Section 10, Article 1, of the Constitution of the United States; and the complainant hereby expressly sets up and relies upon said Article and Section of the Constitution of the United States in protection of its rights, and against the enforcement of said ordinance.

13. That the enforcement of said ordinance will operate as an interference with interstate commerce in violation of the provisions of the Constitution of the United States, Section 8, Article 11, conferring upon Congress the power to regulate interstate commerce, and in violation of the acts of Congress passed pursuant to the power so granted; and the complainant hereby expressly sets up and relies upon said Article and Section of the Constitution of the United States in protection of its rights, and against the enforcement of said ordinance.

14. That the enforcement of said ordinance will result in taking the property of the Seaboard Air Line Railway without due process of law, in violation of the Constitution of the United States, Section 1, Article XIV; and the complainant hereby expressly sets up and relies upon said Article and Section of the Constitution of the United States in protection of its rights, and against the enforcement of said ordinance.

15. That the said track constructed on the sidewalk of Salisbury Street is a great convenience to the merchants of the City of Raleigh and to the public generally, and results in securing for the Seaboard Air Line Railway freight that would otherwise be transported by its competitors, and the amount of revenue, of which it would be deprived by the enforcement of said ordinance, would in time greatly exceed the sum of Three Thousand (\$3,000.00) Dollars; and by the enforcement of said ordinance the Seaboard Air Line Rail-

way will be deprived of its property and property rights of a value greater than Three Thousand (\$3,000.00) Dollars.

16. That the exercise of the right, privilege and franchise which will be destroyed by the enforcement of said ordinance is of a value and benefit to the Seaboard Air Line Railway in excess of the sum of Three Thousand (\$3,000.00) Dollars; and the enforcement of said ordinance will impair the franchise of the Seaboard Air Line Railway and the value of its property to its irreparable damage.

17. That by virtue of its charter and the general laws of the State of North Carolina, the Raleigh & Gaston Railroad Company had the power, with the assent of the municipal authorities of the City of Raleigh, to occupy the said sidewalk for the purpose of running a track thereon, the said power being specifically granted by the Acts of the General Assembly of North Carolina, Session 1871-2, Chapter 38, Section 29, Subsection 6, as brought forward and amended by the Code Sections 1957 and 1982 and Revisal of 1905, Sections 2566 and 2567, as follows:

"Every railroad corporation shall have power: (6) To construct their road across, along or upon any stream of water, water course, street, highway, plank road, turnpike or canal, which the route of its road shall intersect or touch, but the company shall restore the stream or water course, street, highway, plank road and turnpike road thus intersected or touched to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this act contained shall be construed to authorize the erection of any bridge or other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

That this statute has been construed and held by the highest Court of the State to apply to branch and spur tracks not a part of the main line, but used in connection therewith, and to authorize the construction of such tracks in the streets of a municipal corporation, with the consent of the municipal authorities.

18. That the said side track was constructed and has remained in said street and has been maintained pursuant to the powers conferred by the Acts of the General Assembly of North Carolina, Session of 1871-2, Chapter 38, Section 29. Subsection 6, Code of 1883, Sections 1957 and 1982, and Revisal of 1905, Sections 2566 and 2567, with the assent of the City of Raleigh; and the enforcement of the ordinance enacted by the Commissioners of the City of Raleigh on June 10th, 1913, will impair the obligations of the contract thereby created, in violation of Section 10, Article 1 of the Constitution of the United States, the provisions of which said article and Section are again set up and relied upon by the complainant in protection of its rights, and against the enforcement of said ordinance.

19. That the maintenance and operation of the said side track in Salisbury Street, between Jones and Lane Streets, does not unnecessarily impair its usefulness, because the full width of the street and the sidewalk on the west side of the street are

open and free, and the said track occupies only the sidewalk on the east side of the street, on which the complainant is the sole abutting property owner; and the physical conditions are such that the unobstructed street and the sidewalk on the west side thereon meet all the requirements of the public for the use of Salisbury Street, between Jones and Lane Streets.

20. That the lapse of time, more than thirty-one (31) years, during which the said track has been continuously maintained and operated along the said sidewalk has created in the Raleigh & Gaston Railroad Company, and its successor and assign, Seaboard Air Line Railway, the right to retain said track, which right constitutes a contract, subject to the protection of Section 10, Article 1, of the Constitution of the United States, and the enforcement of the ordinance of June 10th, 1913, will result in impairing the obligation of said contract, in violation of the provisions of the Constitution of the United States, the protection and benefit of which said Article and Section of said Constitution the complainant hereby expressly sets up and relies upon.

Wherefore, the complainant, Seaboard Air Line Railway prays that the Court grant unto it a writ of injunction, commanding the said City of Raleigh, and all persons claiming to act under its authority, direction or control, and commanding James I. Johnson, O. G. King and R. B. Seawell, Commissioners of the City of Raleigh, and all persons claiming to act under their authority, direction or control, absolutely to desist and refrain from attempting to enforce the said ordinance of June 10th, 1913, and to desist and refrain from removing or attempting to remove the track of the Seaboard Air Line Railway from the sidewalk of Salisbury Street, in the City of Raleigh, between Jones and Lane Streets, and to desist from, in any manner, hindering or obstructing the complainant, or its agents, servants, or employees, in the use of said track and from in any manner interfering with said track, until such time as the Court shall appoint and direct an order herein; and that upon such hearing the writ herein prayed for be made and confirmed until the final determination of this suit, and that upon the said injunction may be made perpetual.

JAMES H. POU,
MURRAY ALLEN,
*Attorneys for Complainant,
Seaboard Air Line Railway.*

NORTH CAROLINA,
Wake County:

W. T. Huntley, being duly sworn, deposes and says that complainant, Seaboard Air Line Railway, is a corporation; and that he is its Agent at Raleigh, N. C.; that he has read the foregoing bill of complaint; and that the same is true of his own knowledge, except as to matters therein stated upon information and belief; and, as to those matters, he believes it to be true.

W. T. HUNTLEY.

Subscribed and sworn to before me this 27th day of June, 1913.

C. T. McDONALD,
Notary Public, Wake County.

My Commission expires the 1st day of February, 1914.

Marshal's Return.

Received the within Bill of Complaint at Raleigh, N. C., June 27th, 1913, and executed at Raleigh, N. C., June 27th, 1913, upon the City of Raleigh by delivering a copy of within Bill of Complaint to Jas. I. Johnson, Mayor, and upon Jas. I. Johnson Commissioner, O. G. King, Commissioner and R. B. Seawell, Commissioner, by delivering a copy to each.

CLAUDIUS DOCKERY,
U. S. Marshal,

By R. W. WARD,
Office Deputy Marshal.

Marshal's cost \$8.00.

10

Filed June 27th, 1913.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

District Court at Raleigh, Fourth Circuit.

SEABOARD AIR LINE RAILROAD
against

CITY OF RALEIGH, JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh.

Prosecution Bond.

Know all men by these presents, that we, Seaboard Air Line Railway, as principals, and Fidelity and Deposit Company of Md., as surety, are held and firmly bound unto the defendants in the above entitled action, in the sum of two hundred dollars, to the payment of which we bind ourselves firmly by these presents. Sealed with our seals and dated this 27th day of June, 1913.

The condition of the above obligation is such, that whereas the plaintiff in the above named cause has brought an action against the said defendants therein; Now, if the said plaintiff shall prosecute said action with effect, or, in case it fail therein, shall well and truly pay all such costs as shall be awarded and recovered against the said plaintiff in said action, then the above obligation is to be void, otherwise it is to remain in full force and effect.

SEABOARD AIR LINE RAILWAY,
By MURRAY ALLEN, *Attorney.* [SEAL.]
FIDELITY & DEPOSIT CO. OF MD.,
By R. W. WINSTON, [SEAL.]
Attorney-in-Fact.

R. E. BARNES, *Agent*

11 UNITED STATES OF AMERICA,
Eastern District of North Carolina:

District Court at Raleigh, Fourth Circuit.

Equity Subpœna.

The United States of America to City of Raleigh and James I. Johnson, O. G. King, and R. B. Seawell, Commissioners of the City of Raleigh, Greeting:

We command you, and every of you that you appear before the Judges of our District Court of the United States of America, for the Eastern District of North Carolina, at the office of the Clerk of said Court, in the City of Raleigh, in said District, twenty days from the date hereof and answer the bill of complaint of Seaboard Air Line Railway, a citizen and resident of the States of Virginia and North Carolina, filed in the Clerk's office of said Court, in said City of Raleigh, then and thereto receive and abide by such judgment and Decree as shall then or thereafter be made, upon paid of judgment being pronounced against you be default.

To the Marshal of the Eastern District of North Carolina to Execute.

Witness the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States, at Raleigh, in said District, the 27th day of June, 1913, and in the 137 year of the Independence of the United States.

Issued the 27th day of June, 1913.

H. L. GRANT,
Clerk United States District Court.

The within named defendants are notified that, unless they enter their appearance in the Clerk's Office of said District Court at Raleigh, and file their answer or other defense, on or before the 20th day after service hereof, excluding the day of service, the bill filed herein will be taken as confessed and a decree entered accordingly.

H. L. GRANT,
Clerk United States District Court.

12 *Marshal's Return.*

Received the within Equity Subpœna at Raleigh, N. C., June 27th, 1913, and executed June 27th, 1913, at Raleigh, N. C., upon the City of Raleigh, by delivering a copy of the within Equity Subpœna to Jas. I. Johnson, Mayor, and upon Jas. I. Johnson, Commissioner, O. G. King, Commissioner, and R. B. Seawell, Commissioner by delivering a copy to each.

CLAUDIUS DOCKERY,
U. S. Marshal,
 By R. W. WARD,
Office Deputy Marshal.

Marshal's costs \$8.00.

13 In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Notice.

To the City of Raleigh and James I. Johnson, Mayor and Commissioner; O. G. King, and R. B. Seawell, Commissioners, defendants in the above entitled suit:

You are each of you, are hereby notified that complainant Seaboard Air Line Railway, will apply to Hon. Henry G. Connor, Judge of the District Court of the United States for the Eastern District of North Carolina, at Chambers, in Wilson, North Carolina, on Monday, the 7th day of July, 1913, at ten o'clock, A. M., or as soon thereafter as it can be heard, for an injunction and restraining order, enjoining and restraining you, and each of you, from putting into effect, or attempting to put into effect, a certain resolution, in the form of and called an ordinance, adopted by the Commissioners of the City of Raleigh, on the 10th day of June, 1913, relative to the removal of the side track of complainant, situate on the east side of North Salisbury Street, between Jones and Lane Streets, in the City of Raleigh, N. C.

Said application for an injunction and restraining order
14 will be based upon and supported by complainant's bill of complaint filed in the above entitled suit, copies of which are attached to the subpoenas issued in this suit.

Respectfully,

SEABOARD AIR LINE RAIL-
WAY, *Complainant*,
By JAMES H. POU,
MURRAY ALLEN,
Counsel.

Raleigh, N. C., June 27th, 1913.

Marshal's Return.

Received the within Notice to Defendants at Raleigh, N. C., June 27th, 1913, and executed June 27th, 1913, upon the City of Raleigh by delivering a copy of the within Notice to Defendants to Jas. I. Johnson, Mayor, and upon Jas. I. Johnson, Commissioner, O. G.

King, Commissioner and R. B. Seawell, Commissioner, of the City of Raleigh, N. C., by delivering a copy to each.

CLAUDIUS DOCKERY,

U. S. Marshal,

By R. W. WARD,

Office Deputy Marshal.

Marshal's cost \$5.00.

15

Filed July 8th, 1913.

In the District Court for the United States for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Injunction.

This cause coming on to be heard upon motion of complainant for an injunction restraining and enjoining the defendants from attempting to enforce an ordinance of the City of Raleigh of June 10th, 1913, directing the removal of the track of the complainant from the sidewalk on the East side of Salisbury Street between Jones Street and Lane Streets in the City of Raleigh and restraining and enjoining the defendants from removing or attempting to remove said track until the hearing of this cause, and the City of Raleigh and James I. Johnson, O. G. King, and R. B. Seawell, Commissioners of the City of Raleigh, defendants, by their counsel, consenting to an order awarding such injunction until the hearing.

Now, therefore, by consent of the parties to this action, it is ordered that you the said City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of the City of Raleigh, defendants herein, your agents and servants and all persons claiming to act under your authority, direction and control, be and you are hereby specifically restrained and enjoined from attempting to enforce the ordinance of the city of Raleigh adopted June 10th,

16 1913, directing the removal of the track of the complainant, Seaboard Air Line Railway from the sidewalk on the East side of Salisbury Street between Jones Street and Lane Street in the City of Raleigh, and you are hereby specially restrained and enjoined from removing or attempting to remove said track and from in any manner hindering or obstructing the complainant or its agents, servants or employees in the use of said track until the hearing of this cause on October Rule Day of this Court, it being the 6th day of October, 1913.

It is, by consent, further ordered that the defendants may have

until September 1st, 1913, in which to file their answers to the bill of complaint.

It is further ordered that a copy of this order certified under the hand and seal of this Court be served on each of the defendants to be restrained and enjoined thereby.

Dated at Raleigh, N. C., this 8th day of July, 1913.

[SEAL.]

H. G. CONNOR,

*Judge of the United States District Court,
Eastern District of North Carolina.*

Marshal's Return.

Received July 8th, 1913, and executed same day at Raleigh, N. C., by delivering copy of within Injunction each to James I. Johnson, Mayor, for City of Raleigh, James I. Johnson, Commissioner, O. G. King, Commissioner, etc. and R. B. Seawell, Commissioner, etc. all of the city of Raleigh, N. C.

CLAUDIUS DOCKERY,
U. S. Marshal.

Fees \$8.00.

17

Filed July 8th, 1913.

In the United States District Court for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY

vs.

CITY OF RALEIGH, JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners.

It is agreed that the above matter which was set for hearing before His Honor, Henry G. Connor, Judge of the United States District Court for the Eastern District of North Carolina, on July 7th, 1913, at Wilson, N. C., may be heard at Raleigh, N. C., and the notice of the hearing at Wilson will be treated as notice of the hearing at Raleigh, N. C., on July 7, 1913.

JAMES H. POU,
MURRAY ALLEN,

Attorneys for Complainant.

JOHN W. HINSDALE, JR.,
Attorney for Defendants.

18 In the District Court of the United States, Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh.

Order Continuing Injunction.

This cause coming on to be heard on this 6th day of October, 1913, upon the injunction issued on the 8th day of July, 1913:

Now, by consent, it is ordered that the said injunction be continued to the 25th day of November, 1913.

H. G. CONNOR,

Judge United States District Court, Eastern District of North Carolina.

19

Filed Sept. 10, 1913.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Answer.

The City of Raleigh and James I. Johnson, O. G. King, and R. B. Seawell, Commissioners of the City of Raleigh, defendants in the above entitled cause, answering the bill of complaint filed herein say:

1. That the allegations of Paragraph One of the bill of Complaint are admitted.

2. That the allegations of Paragraph Two of the Bill of Complaint are admitted.

3. That the allegations of Paragraph Three of the Bill of Complaint are denied.

4. That the allegations of Paragraph Four of the Bill of Complaint are admitted.

5. That the allegations of Paragraph Five of the Bill of Complaint are admitted.

6. That the allegations of Paragraph Six of the bill of Complaint

are denied, except that it is admitted that about the year 1881 a cotton compress was erected on the site named and for the purposes named, and that permission was requested by the said Railroad, of the Board of Aldermen of the City of Raleigh to use the sidewalk on the east side of Salisbury Street between Jones and Lane Streets, for the purpose of constructing thereon a sidetrack.

20 7. That the allegations of Paragraph Seven of the Bill of Complaint are denied, except that it is admitted that the Board of Aldermen of the City of Raleigh granted the Raleigh & Gaston R. R. Co., permission to occupy the sidewalk on the East side of Salisbury Street, between Jones and Lane Streets for the purpose of erecting a track; and it is specifically denied that the Board of Aldermen of the said City of Raleigh had the right under the then existing charter of said City to grant such permission for such use of said street.

8. That it is admitted that the Raleigh & Gaston R. R. Co. built a sidetrack on said Street as alleged in Paragraph Eight of the Bill of Complaint and except as herein admitted, the allegations of Paragraph Eight of the Bill of Complaint are denied.

9. That it is admitted that the sidetrack was laid on said Street, but except as herein admitted, the allegations of Paragraph Nine of the Bill of Complaint are denied.

10. That it is admitted that the Raleigh & Gaston R. R. Co. has merged into the Seaboard Air Line Ry. Co., and that the said Seaboard Air Line Ry. Co. has succeeded to its rights and privileges, but it is denied that any right, privilege or franchise existed at the time of said merger, or at any other time prior to or since said merger, as to the use of the sidewalk in question.

11. That the allegations of Paragraph Eleven of the Bill of Complaint are admitted.

12. That the allegations of Paragraph Twelve of the Bill of Complaint are denied.

13. That the allegations of Paragraph Thirteen of the Bill of Complaint are denied.

21 14. That the allegations of Paragraph Fourteen of the Bill of Complaint are denied.

15. That the allegations of Paragraph Fifteen of the Bill of Complaint are denied.

16. That the allegations of Paragraph Sixteen of the Bill of Complaint are denied.

17. That the allegations of Paragraph Seventeen of the Bill of Complaint are denied; and it is specifically denied that Sub-section 6 of Section 29, of Chapter 138 of the acts of the General Assembly of 1871-'2 or Code Sections 1957 and 1982, or Revisal 1905 Sections 2566 and 2567 apply to or confer any authority, right or privilege upon the Raleigh & Gaston R. R. Co., or its successor.

18. That the allegations of Paragraph Eighteen of the Bill of Complaint are denied.

19. That the allegations of Paragraph Nineteen of the Bill of Complaint are denied.

20. That the allegations of Paragraph Twenty of the Bill of Complaint are denied.

Further answering the Bill of Complaint of the plaintiff the defendants say:

1. That the Board of Aldermen of the City of Raleigh did not have the power and authority to grant permission to the Raleigh & Gaston Railroad Company to occupy the sidewalk on Salisbury St. between Jones St. and Lane St. without legislative authority.

2. That at the time the said side track was laid on Salisbury Street a cotton compress was being operated upon the lot adjacent to said side track and the same was built to afford shipping facilities to this compress, that said compress has not been used in many years and has been torn down and removed, and that for the past several years the Seaboard Air Line Railroad has continued to use the said side track for purposes of storing empty cars and of loading and unloading freight, thereby blocking the street and depreciating and injuring the property on the West side of said Street and across from said side track.

3. That said side track is in the heart of the City of Raleigh and within one block of the Capitol Square, and just to the rear of the Supreme Court Library, which is upon the adjoining block, that since the establishment of said sidewalk the City of Raleigh has more than doubled in population and the property adjacent to said side track and to the North of the same has greatly improved and grown, that the said Salisbury St. has been extended and widened to the North of said side track and at the present time the same is a nuisance to the citizens of Raleigh living to the North of said side track, who use Salisbury Street in going to and from the business part of the City of Raleigh.

4. That within the past two years, the Seaboard Air Line Railway, upon the site of the old cotton compress and immediately to the East of said sidetrack and 2 to 7 feet below the said side track, has erected a large and commodious freight warehouse with an approach to the same by wagons from the East on the side of the building opposite to said side track, with two tracks between the said depot and the East line of the sidewalk in question, and in addition thereto has constructed several team tracks to the North of said Freight warehouse affording ample facilities for loading and unloading freight. That the side track on Salisbury St. is not necessary to the proper conduct of the railroad of the *conduct of the plaintiff* and in fact is not used by it except on occasions for the unloading of freight, being more often used for the storing of empty freight cars.

5. That the Seaboard Air Line Railway has a side track adjacent to the side track in question, which could be used for loading and unloading freight, which it has never connected with its other lines.

Wherefore defendants and each of them pray that the injunction issued against them herein be dissolved; that the plaintiff be ordered to remove the side track from the sidewalk on Salisbury Street between Jones and Lane Streets and for such other and further relief as they may be entitled to.

JOHN W. HINSDALE, JR.

CHAS. U. HARRIS.

DOUGLAS & DOUGLAS

NORTH CAROLINA,
Wake County:

James I. Johnson, being duly sworn, deposes and says, that the defendant herein, the City of Raleigh, is a municipal corporation and that he is its Mayor and Commissioner of Finance; that he has read the foregoing answer and that the same is true to his own knowledge, except as to matters therein stated upon information and belief and as to those matters he believes it to be true.

JAS. I. JOHNSON.

Subscribed and sworn to before me, this 10th day of Sept. A. D., 1913.

MILLIARD MIAL, C. S. C.

24 Filed Dec. 19th, 1913.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Agreed Facts.

It is agreed by the complainant and defendants to submit this matter upon the admissions in the pleadings, such statutes as the parties shall offer and as shall be admitted in evidence and the following facts:

1. That when the side track was constructed about the year 1881, it was used as a public track in connection with the cotton compress in the cotton season and was used for the purpose of loading and unloading freight for the public without additional compensation to the railroad for its use, and for any other purpose for which the railroad desired to use it. And that since the year 1906 the cotton compress has not been used, and since that time the said track has been used exclusively for loading and unloading freight, and storing empty cars.

2. That the minutes of the meeting of the Board of Aldermen of the city of Raleigh on August 6th, 1881, contained the following entry:

"Upon application of John C. Winder, Gen. Supt., the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the East side of Salisbury street, between Jones and Lane Streets, for the purpose of running a track."

3. That after the said action by the Board of Aldermen of the city of Raleigh, the Raleigh & Gaston Railroad Company built a track on said sidewalk and the said track has since its construction been used by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, as a public track for the delivery

and receipt of freight for intrastate and interstate transportation and it has been and is now used by the merchants of the City of Raleigh and by the public, and the said track on account of its location is convenient for the purpose for which it is used.

4. That the said track has been maintained and operated by the Raleigh & Gaston Railroad Company and Seaboard Air Line Railway since 1881, and the construction and use of said track has been known to and permitted by the officers and representatives of the City of Raleigh, prior to the — day of May, 1911, when the Board of Aldermen ordered the removal of said track.

5. That the right to maintain said track as it is now placed on Salisbury Street and use it for the purpose of loading and unloading freight is of a value to the Seaboard Air Line Railway exceeding \$3,000.00 exclusive of interest and costs.

6. That the Seaboard Air Line Railway is the sole owner and occupant of the block in the city of Raleigh bounded on the West by Salisbury Street, on the North by Lane Street, on the East by Halifax Street and on the South by Jones Street, and is the sole owner and occupant of the block in the city of Raleigh next adjoining to said block and to the North thereof, bounded as follows: On the west by Salisbury Street, on the North by North Street, on the East by Halifax Street and on the South by Lane Street, and the two blocks are used by the Seaboard Air Line Railway for the purpose of its business exclusively.

26 7. That Salisbury Street is 43 feet in width from curb to curb at the point at which this track is located, and in addition thereto a sidewalk is located on the West side of said street, 13 feet in width, and the part of the sidewalk on the East occupied by this track is 10 feet, and the width of the street and the sidewalk on the West side are available for public use and are used by the public.

8. That in constructing a new freight station, about two years ago, it was necessary for the Seaboard Air Line Railway to make an excavation at the corner of Jones and Salisbury Streets, of about 8 feet, the said excavation extending to the North along Salisbury Street, and the tracks constructed in connection with said freight station are in this excavation and the freight station is between these tracks and Halifax Street and they cannot be used as team tracks and the other team tracks of the Seaboard Air Line Railway are on Lane Street which is one block North of Jones Street, a distance of 420 feet, and the said tract on Salisbury Street extends from Jones Street to Lane Street.

9. That the southern end of the said track on Salisbury Street is one block North of the state capitol, a distance of 420 feet.

10. That with the track where it is there is no sidewalk on the East side of Salisbury Street between Jones Street and Lane Street for use by pedestrians.

JAMES H. POU,
MURRAY ALLEN,
Attorneys for Complainant.
J. W. HINSDALE, JR.,
CHAS. U. HARRIS,
DOUGLASS & DOUGLASS,
Attorneys for Defendants.

27 In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Additional Facts Agreed.

In the above entitled cause it was agreed at the hearing that the following should be added to the facts agreed:

It is agreed by counsel for the complainant and defendants that the charter of the City of Raleigh was revised and consolidated in Chapter 98 of the Private Acts of 1856 and 1857, Section 58, of which is as follows: and which was in force Aug. 5, 1881:

"That the Commissioners shall cause to be kept clean and in good repair streets, sidewalks and alleys. They may establish the width and ascertain the location of those already provided and lay out and open others and may reduce the width of all of them".

That in the charter of the City of Raleigh now in force, Article V, Section 1, the Commissioners of the City of Raleigh are given power:

"To direct, control and prohibit the laying of railroad tracks, turnouts, and switches in the streets, avenues, and alleys of the city, unless the same shall have been authorized by ordinance, and to require that all railroads, turnouts, and switches shall be constructed as not to interfere with the drainage of the city and with the ordinary travel and use of the streets, avenues, and alleys in said city, and to construct and keep in repair suitable crossings, at the intersection of streets, avenues and alleys, and ditches, sewers, and culverts where the board of commissioners shall deem it necessary.

H. G. CONNOR,

*Judge of the District Court of the
United States for the Eastern Dis-
trict of North Carolina.*

JOHN W. HINSDALE, Jr.,
Counsel for Complainant.

MURRAY ALLEN,
Counsel for Defendant.

28

Filed December 15th, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RY. Co., Plaintiff,

VS.

THE CITY OF RALEIGH and Others, Defendants.

Bill filed by plaintiff seeking an injunction restraining the City of Raleigh and the individual defendants, Commissioners, from enforcing an ordinance requiring plaintiff to remove its track from the side walk, being a part of Salisbury Street, Raleigh, N. C.

Murray Allen, James H. Pou, of Raleigh, N. C., for Plaintiff.

John W. Hinsdale, Jr., Charles U. Harris, Douglas & Douglas, of Raleigh, N. C., for Defendants.

CONNOR, *District Judge*:

The cause was submitted upon the bill, answer, and statement of facts agreed upon by the parties. Plaintiff is a Virginia Corporation and successor to the property, rights and franchises of the
29 Raleigh & Gaston Railroad Company, chartered by the General Assembly of North Carolina, at its Session of 1835. The City of Raleigh was the Southern terminus of said railroad. Pursuant to the provisions of the charter, the said company constructed a track from Gaston, N. C., to Raleigh, N. C. and constructed terminals and depots, in said city, for the receipt and delivery of freight and passengers, including a freight depot and a warehouse on Halifax Street between Lane and North Streets, extending from Halifax Street to Salisbury Street, extending its tracks from the main line of the Raleigh & Gaston Railroad across Salisbury Street into said depot and warehouse. During the year 1881, a cotton compress was constructed on a lot in the City of Raleigh, bounded by Salisbury, Jones, Halifax and Lane Streets and, for the purpose of delivering to, and receiving cotton from said warehouse, and to serve the patrons of the said Rail Road Company, and to furnish the public facilities for the delivery of cotton in car load lots, and to better perform its functions as a common carrier, the Raleigh & Gaston Rail Road Company made application to the Board of Aldermen of Raleigh for the grant of the right, privilege or franchise, to occupy the side walk on the East side of Salisbury Street between Jones and Lane Streets for the purpose of constructing a track thereon. Said Board of Aldermen on August 5, 1871, adopted the following resolution, or ordinance:

"Upon application of John C. Winder, General Superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the side walk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track."

When the track was constructed, pursuant to the permission granted by said ordinance, it was used as a public track in connection with the cotton compress in the cotton season, and was used for the purpose of loading and unloading freight for the public, without additional compensation to the railroad for its use, and for any other purpose for which the railroad company desired to use it. Since the year 1906, the cotton compress has not been used. Since that date the said track has been used exclusively for loading and unloading freight and storing empty cars engaged in inter and intrastate traffic. It has been, and is now, used by the merchants of the city of Raleigh and by the public and on account of its location, is convenient for the said purpose. The right to maintain said track, as it is now placed and used on Salisbury Street, is of value to plaintiff, exceeding \$3,000.00, exclusive of cost herein.

The track has been maintained and operated by the Raleigh & Gaston Railroad Company and the plaintiff, its successor, since 1881, with the knowledge and permission of the officers and representatives of the City of Raleigh. The plaintiff is the sole owner and occupant of the block of land, in said city bounded on the west by Salisbury Street, on the North by Lane Street, on the East by Halifax Street and on the South by Jones Street, and is the sole owner and occupant of the block in said City next adjacent to said block and to the north thereof, bounded on the west by Salisbury Street, on the north by North Street, on the east by Halifax Street and on the south by Lane Street. The two blocks are used by the plaintiff for the purpose of conducting its business exclusively. Salisbury Street is 43 feet wide between curbs at that point at which the track is located on the side walk and, in addition thereto, there is located a side walk on the west side of the street 13 feet wide, the portion of the side walk on the east side of the Street occupied by plaintiff's track, is 10 feet wide; the street and the side walk on the west side thereof, are available to, and are used by the public. In constructing a new freight station two years ago, it was necessary for the Seaboard Air Line Ry. Company to make an excavation at the corner of Jones and Salisbury Streets of about 8 feet, extending northwards along Salisbury Street, the tracks constructed in connection with said freight station are in this excavation and the freight station is between these tracks and Halifax street. They can not be used as team tracks, and the other team tracks of plaintiff, which are on Lane Street, which is one block north of Jones Street, a distance of 420 feet; the said track on Salisbury Street extends from Jones Street to Lane Street. The Southern end of the track on Salisbury Street is one block north of the State Capitol, a distance of 420 feet. With the track as it is now laid and used, there is no side walk on the east side of Salisbury Street, between Jones and Lane Streets, for use by pedestrians. Within the two years last past plaintiff has built on the site upon which the compress stood, and immediately to the east of said side track, a commodious freight warehouse, with an approach to the same by wagons from the east and the side of the building opposite said side track with two tracks

between said depot, and the east line of the side walk in question and, in addition thereto, has constructed several team tracks to the north of said warehouse.

At their meeting, on June 10, 1903, the defendants, Commissioners of the City of Raleigh, after hearing the matter, and against the protest of plaintiff, adopted a resolution ordering the removal of the track constructed and maintained by plaintiff on the side walk, on the east side of Salisbury Street, between Jones and Lane Street, being the track described in the resolution, or ordinance of August 5, 1881. By said resolution, the Commissioner of Public Works of

the City of Raleigh was directed if plaintiff failed to do so to remove the said track. Certain Private Laws are set out or referred to, in the Bill and are to be considered as in evidence. A preliminary injunction was issued and the cause heard upon the prayer for a permanent injunction restraining defendant from removing said track, or otherwise enforcing said resolution or ordinance of June 10, 1913. It is conceded that the plaintiff is entitled, by succession, to such rights, privileges and franchises as are vested in the Raleigh & Gaston Railroad Company by virtue of its charter, and amendments thereto, and the ordinance of August 5, 1881, or which it may, upon the facts herein set out, have otherwise acquired. While it is settled by abundant authority, that Courts of Equity will not, save in exceptional cases, enjoin the enforcement, or execution of the criminal law, or of city ordinances imposing fines and penalties for their violation, it is also settled that, where rights of property are involved, and the enforcement of such ordinances violate vested rights, injunctive relief will be awarded, especially where such enforcement will work irreparable injury. In *Owenboro vs. Cumberland Telephone Co.*, 230 U. S. 58, the Court enjoined the enforcement of an ordinance revoking a grant of a franchise to occupy the streets of a city. The power of the court to enjoin the enforcement of an ordinance regarding railroad tracks in streets was recognized in *A. C. L. R. R. Co. vs. Goldsboro*, 232 U. S. 54. The refusal on the part of the defendant to obey the ordinance subjects it to indictment for a misdemeanor (Rev. 3702). If no other mode of enforcement was prescribed by the ordinance, the Court would find no authority for interfering. The validity of the resolution, or ordinance, could be tested by way of defence to an indictment. It is conceded that defendant's officer, unless restrained, will proceed summarily to remove the track. If plaintiff's contention upon the merits of the controversy, are sustained, it would seem that its right should be protected by injunction. It is con-

33

ceded that plaintiff is a public utility corporation and such right as it has acquired to occupy the side walk is used in the prosecution of its business as a common carrier. The Charter of the City of Raleigh, at the date of the ordinance, of August 5th, 1881, and since that time, confers upon its Commissioners power to keep clean, and in good repair, the streets side walks and alleys, to establish the width and ascertain the location of those already provided and lay out and open others and may reduce the width of all of them. It may be conceded that this language confers upon the

governing Board the usual powers granted to municipal authorities in regard to the use of the streets—including the power to grant to quasi public corporations, such as the plaintiff, the right to a reasonable use of the public streets, not inconsistent with the right of the public. *Griffin vs. R. R.*, 150 N. C. 312. It may be further conceded that, when such right of user is granted, within the power of such authorities, and such grant is accepted and acted upon, a property right vests in the grantee of which it may not be deprived, otherwise than by due process of law. *Owensboro vs. Cumberland Telephone Co.*, *supra*, where these propositions are decided and the authorities cited. Notwithstanding these concessions two questions remain open for decision. Did the ordinance of 1881 construed in the light of then existing conditions, and the reasons inducing its passage, grant to plaintiff's predecessor in title, a right to be enjoyed in perpetuity to appropriate to its use, by locating and maintaining a track thereon, to the exclusion of all others, the side walk for any and all purposes, connected with the operation of its freight traffic, and if so, was such grant within the power of the Board of Commissioners to make. Mr. Justice Lurton, in the *Cumberland Telephone Company case*, *supra*, says: "The grant, by ordinance, to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city, with its poles, and wires, for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant."

The power to grant a reasonable use of the streets of Raleigh to a public utility corporation, is sustained in *Moore vs. Power Co.*, 163 N. C. 300. The title to the soil in the streets of the city is in the State, but the power to subject them to the use of the municipality and its inhabitants, is in its governing board, *supra*. It is a well settled rule of construction, applied to grants of public property, which has been applied to grants of the use of streets that, "Where special street privileges and franchises are granted, which interfere with the authority of the municipality to control its streets and with free use thereof by the public, the grant must be construed strictly in favor of the public and against the grantee." 27 Am. & Eng. Enc. 154. The soundness, if not necessity, for this salutary rule, is manifest. The resolution, or ordinance, does not use appropriate or usual, words found in grants, as distinguished from a license. In the *Cumberland Telephone Co. case*, *supra*, the right to erect and maintain poles and wires is "granted". So in *Pike's Peak Power Co. vs. Colorado Springs*, 105 Fed. 1, the right to use the streets for the purpose of stringing wires was "granted" to the Company. In construing the language of the ordinance of 1881, for the purpose of ascertaining the intention of the parties, the purpose for which the permission to occupy the side walk was given should be kept in view. A cotton compress had recently been erected on the Raleigh & Gaston R. R. Company. It is proper to take no-

35 tice of the fact that in moving bales of cotton either to or from the compress, the distance and physical conditions, are of essential importance in regard to cost and convenience in operating the compress. Again, as is well known, the compress would ordinarily be operated only a portion—not exceeding one third of the year. The cost of laying a spur, or side track for the distance required, on the side walk was, as compared with its value, small. It is doubtful whether the considerations which induced the Commissioners to give to the Raleigh & Gaston Railroad Company permission to occupy, by laying its track over the side walk, for the purpose of enabling it to successfully operate the compress would have been sufficient to move them to make a grant of a franchise to do so, for all purposes, in perpetuity. Certainly the terms used, so appropriate to confer a temporary, revocable, license, and so inappropriate to vest, by grant, a perpetual and exclusive use of the side walk, are sufficient to raise, in the mind, a reasonable doubt as to the intention of the parties which, upon the principle uniformly applied in such cases, should be solved in favor of the public for whose use the property in the soil was held. *Minturn vs. Larue*, 23 How. 435. The principle is clearly stated by Mr. Justice Clifford, in *Holyoke Co. vs. Lyman*, 15 How. 500 (512): "Wherever privileges are granted to a corporation, and the grant comes under revision in the Court, such privileges are to be strictly construed against the corporation and in favor of the public and nothing passes but what is granted in clear and explicit terms".

The language of the Court in *Water Company vs. Knoxville*, 200 U. S. 22, strongly states the principle and expressly applies it to city ordinances affecting the rights of the public in streets. Mr. Justice Harlan, after citing many cases, says: "It is true that the cases to which we have referred involved, in the main, the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect to matters which concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by implication. If, by contract, or otherwise, it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words, so clear as not to admit of two different or inconsistent meanings." It will be observed that in *Owensboro vs. Cumberland Telephone Company*, supra, relied upon by plaintiff, the language of the ordinance, under which the corporation claimed the franchise, is free from ambiguity. The Telephone Company was "granted the right to erect and maintain its poles in the streets." It is also provided that "nothing in the ordinances should be construed as an exclusive right to said company to erect poles, etc.," and, by Section 4 of the ordinance, certain duties and obligations are assumed by the corporation, constituting a valuable consideration, enuring to the benefit of the citizens of the city for the grant of the franchise—thus giving to the ordinance a contractual character, within the power of the Commissioner to make. It will be also noted that Judge Lurton, in sus-

taining the ordinance says: "Nor did it undertake to grant an exclusive right. Express power to grant an exclusive right has generally been held essential." He says that, as the grant was not exclusive the Court was not called upon to deal with that question.

If it be conceded that, by the ordinance of August 5th, 1881, the Commissioners undertook to grant to the Raleigh & Gaston Railroad Company, and its successors, the exclusive right, in perpetuity, to occupy and maintain a track, for all such purposes as it, or they deemed proper in the prosecution of their business as common carriers, the side walk on the eastern side of Salisbury Street,

37 the question is presented whether they were vested, by the charter of the city, which constituted the grant of legislative authority in that respect, with the power to do so. Conceding that the power granted the Commissioners, in regard to the use of the streets, includes the power to "regulate" such use, and giving to this language the interpretation given it in Cumberland Telephone Company case, *supra*, and in Moore vs. Power Company, *supra*, the question is yet open, whether the power claimed by plaintiff is conferred. In State vs. R. R., 141 N. C. 736 (53 S. E. 290), the Supreme Court of this State held: "In absence of an express power in the charter of a city to grant a permanent easement in a street, a license granted to a railroad company to lay tracks and operate trains in a street can not be construed as a grant of a permanent easement." After citing authorities, it is said: "The general rule to be extracted from the authorities is that the legislative power vested in municipal bodies, is something which can not be bartered away in such manner as to disable them from the performance of their public functions." While the Supreme Court of this State has, in a number of cases, sustained the power of the Commissioners, or other governing body of municipalities, to grant to public service corporations the right to place their tracks, poles, wires, pipes, etc., in, under and along the public streets, no case has been found in which the power has been claimed to grant an exclusive and perpetual use of a street, or side walk, to such corporations. Griffin vs. R. R., 150 N. C. 312, relied on by plaintiff, falls for short of sustaining such power. There, the Commissioners granted the right to the defendant to lay its track along the street—there is no suggestion that the track occupied the entire street, to the exclusion of pedestrians, or persons passing in vehicles.

38 The plaintiff, as an abutting owner, sought to enjoin the defendant from exercising the privilege granted. For manifest reasons, and upon well settled principles, the Court refused to grant the injunction. The grounds upon which that, and the cases cited in the opinion of the Chief Justice, are based, are not applicable here. That the occupation of the side walk by plaintiff's track excludes all other persons from passing over the side walk, otherwise than by walking over the track, when not appropriated by plaintiff's freight cars, is conceded. The extent of the claim asserted by plaintiff, for all practical purposes, vests in it the absolute and exclusive use of the side walk. This claim is based upon an ordinance adopted by the Commissioners giving "permission" to its predecessor in title, to occupy the side walk, without

any limitation in respect to time, and without any valuable consideration, to support a contract, or the use of any contractual language. The permission was given to meet a condition, and promote a purpose, temporary in character, which has ceased to exist. If plaintiff's contention is sustained, the entire side walk, for 420 feet on one of the principal streets of the capital city of the State, in a short distance of the State House and other public buildings, extending from Jones to Lane Streets, is appropriated to the exclusive use of the plaintiff. The claim is based upon the language of an ordinance adopted thirty years ago, to meet a temporary condition, during which time the city has increased very greatly in population. The claim invites careful consideration and its successful maintenance demands strong reasons, or controlling authority. Giving to the numerous decided cases, and the language used by the Courts, due weight, in the light of the facts upon which they are based, I am constrained to reach the conclusion, that by a fair construction, the ordinance of August 5, 1881, interpreted in the

39 light of the condition under which it was used, and the purpose which the parties had in view, does not vest in the plaintiff the property right in the use of the side walk for which it contends, and that, if such construction is permissible, the Commissioners were not vested by the legislature with power to make such exclusive, perpetual grant of the side walk to the Raleigh & Gaston Rail Road Company, which prevents the present governing Board, in which the power is vested and upon which the duty is imposed, to control and regulate the use of the side walk for the benefit of the public, from making and enforcing the ordinance of June 10, 1913. Plaintiff relies upon the provisions of the State Statute in force at the date of the ordinance of 1881, giving to all railroad companies the right to construct their tracks across, along or upon any street * * * which the route of their road shall intersect or touch "provided the company shall restore the street, thus intersected, or touched, to its former state, or, to such state as not unnecessarily to have impaired its usefulness." Rev. 2567. Conceding, for the reasons assigned, pro hac vice, that the plaintiff has the rights and privileges conferred by this Section, free from the limitation in regard to "the assent of the corporation", it is confronted with the duty imposed by the statute to restore the * * * thus intersected or touched to its former state, etc. It is doubtful whether the language of the section can be construed to authorize the exclusive appropriation of the street. The side walk is a portion of the street appropriated to the use of pedestrians. To construe the grant of the right to construct its road "across, along, or upon" a street, always of much greater width than a rail road track, and the cross ties, as a grant of the right to occupy the entire street, or side walk, is not permissible in the light of the recognized rule of construction of such grants of power. How is it possible

40 to to restore the street to "its former state", if the track occupies its entire width. Statutes must be given a reasonable construction.

Plaintiff further contends that, by reason of the long time elapsing

since the occupation of the side walk, with the knowledge and acquiescence of the defendants, they are estopped from asserting a claim to the use of the side walk, for the use of the public, and for this contention quotes the language of Judge Dillon: "If the municipality has the power to grant such right, or franchise, and a corporation believing and assuming that it has the consent or grant of the municipality, has with the knowledge of the proper municipal authorities, proceeded to exercise the right, or franchise, and has constructed, maintained and operated its works and appliances in the city streets, the municipality will, in a proper case, be estopped by the acts and conduct of its officers, and representatives in knowingly permitting and acquiescing in the use and occupation of the streets from asserting the invalidity of the grant of the franchise, at least so far as its failure to pass an ordinance, or take the steps necessary to effectuate the grant." Mun. Corp. 1242. The difficulty with which plaintiff is met, in invoking the principle thus announced, is found in the absence of the power in the corporation to grant the alleged right or franchise. If the power existed, the right is granted—if it did not exist, the plaintiff has, at all times, maintained a nuisance by an unlawful obstruction of the side walk and it is clear that the municipality is never estopped from abating a public nuisance. Construing the ordinance of August 5, 1881, as a revocable license, the plaintiff lawfully occupied the side walk until such license was revoked and of course no estoppel can accrue, under this view. Plaintiff, in another form, asserts the right to continue the occupation of the side walk by averring that, by reason of the lapse of time since the passing of the ordinance, a grant will be presumed. This, under our statutory system, by which title is acquired by lapse of time, is but a plea of the statute of limitations, and is met by the language of the Court in *Turner vs. Commrs.*, 127 N. C. 153. "As to streets * * * and other property which the city may hold in trust for the public, without power to alternate, it is true that no statute of limitations can run." *Moose vs. Carson*, 104 N. C., 431, Rev. 389. The occupation of the side walk, under the license was not adverse until the passage of the ordinance of June 10, 1913. To the suggestion that the occupation of the side walk on the eastern side of Salisbury Street, does not unnecessarily impair the usefulness of the Street, because there is a space of 43 feet between curbs, and 13 feet side walk on the western side walk, it is sufficient to say that the control of the streets, in these respects, is committed to the Board of Commissioners of the City and not to the Courts. If the Board has the power to pass the ordinance of June 10, 1913, requiring the plaintiff to remove the track from the side walk, it is neither the province, nor within the power of the Court to question its wisdom, or propriety. It may not be improper, however, to say that, in the light of the facts agreed upon and physical conditions of which it is impossible to be ignorant, and the contention seriously made, and ably pressed, by plaintiff, the wisdom of the action of the Commissioners for the preservation of the rights of the public committed to their care, is very manifest. The questions presented and argued are, in many respects, of first impression in this State, and their cor-

rect solution of much interest to the public and public service corporations, whose business requires the use of the public streets. I concur in the opinion of the Supreme Court that "The City clearly possesses the statutory right to assent to the use of the street by the railroad company. This is after a most essential power, necessary to be used for the benefit of the people of the city."

42 I am further of the opinion that, in the absence of an express legislative grant, the terms of which are free from doubt or ambiguity, the municipal authorities are not authorized to grant to a public utility corporation a franchise to occupy and appropriate the exclusive use of a street or side walk to be enjoyed in perpetuity. Such power was not granted to the Board of Commissioners of the City of Raleigh by the charter existing at the time the resolution, or ordinance, giving permission to the Raleigh & Gaston Rail Road Company to occupy the side walk on Salisbury Street was adopted, August 5th, 1881.

The only relief sought being injunctive, the plaintiff's Bill will be dismissed and the defendants will recover their cost.

H. G. CONNOR,
United States District Judge.

December 11, 1914.

43

Filed December 15, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Final Decree.

This cause coming on to be heard upon the bill of complaint, answer and statement of facts agreed upon by the parties, and being heard, and it appearing to the Court that the only relief sought is injunctive and the Court being of opinion that the complainant is not entitled to such relief,

Now, therefore, it is ordered, adjudged and decreed that the bill of complaint be dismissed and the costs of this suit be paid by the complainant.

H. G. CONNOR,
*Judge of the District Court of the United States
for the Eastern District of North Carolina.*

44

Filed Dec. 29th, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Bill of Exceptions.

To the decree rendered by the Court the complainant, Seaboard Air Line Railway, in due form and in apt time and in full compliance with the rules in that respect of the said District Court excepted and tendered this, its bill of exception-, and asked that it be allowed, signed and sealed, and it is allowed, signed and sealed accordingly.

H. G. CONNOR, Judge. [SEAL.]

To the decree rendered by the Court the complainant, Seaboard Air Line Railway, in due form and in apt time and in full compliance with the rules in that respect of the said District Court excepted upon the following grounds, to-wit:

1. Because the United States District Court for the Eastern District of North Carolina erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the ordinance of the City of Raleigh ordering the removal of the track of the complainant from the street and sidewalk on the east side of north Salisbury Street in the City
45 of Raleigh between Jones and Lane Streets, will impair the obligation of a valid and binding contract between the City of Raleigh and the complainant in violation of Section 10, Article 1, of the Constitution of the United States, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

2. Because the said Court erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the said ordinance will operate as an interference with interstate commerce in violation of the provisions of the Constitution of the United States, Section 8, Article II, conferring upon Congress the power to regulate interstate commerce, and in violation of the acts of Congress passed pursuant to the power so granted, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

3. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for

that by virtue of its charter and the general laws of the State of North Carolina, the Raleigh & Gaston Railroad Company, predecessor of complainant, had the power, with the assent of the municipal authorities of the City of Raleigh to occupy the sidewalk on the east side of north Salisbury Street between Jones and Lane Streets in the City of Raleigh, for the purpose of running a track thereon, the said power being specifically granted by the acts of the General Assembly of North Carolina, Session 1871-2, Chapter 38, Section 29, Subsection 6, as brought forward and amended by the Code, Sections 1957 and 1982, and Revisal of 1905, Sections 2566 and 2567, as follows:

"Every railroad corporation shall have power: (6) to construct their road across, along or upon any stream of water, water course, street, highway, plank road, turnpike or canal, which the route of its road shall intersect or touch, but the company shall restore the stream or water course, street, highway, plank road and turnpike road thus intersected or touched to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this act contained shall be construed to authorize the erection of any bridge or other obstruction across, in or over any stream or lake navigated by stream or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

That the said track was constructed and has remained in said street and has been maintained pursuant to the powers conferred by the said acts of the General Assembly of North Carolina, with the assent of the City of Raleigh, and the enforcement of the ordinance enacted by the Commissioners of the City of Raleigh ordering the removal of said track will impair the obligation of the contract thereby created in violation of Section 10, Article 1 of the Constitution of the United States, the provisions of which article and section were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

4. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that the lapse of time, more than 31 years during which the said track has been continuously maintained and operated along the said sidewalk has created in the Raleigh & Gaston Railroad Company and its successor and assign, Seaboard Air Line Railway, complainant in this suit, the right to retain said track which right constitutes a contract, subject to the protection of Section 10, Article 1, of the Constitution of the United States, and the enforcement of said ordinance ordering the removal of said track will result in impairing the obligations of said contract in violation of the said provisions of the Constitution of the United States, the protection and benefit of which said Article and Section of the Constitution, the complainant expressly set up and relied upon.

5. Because the said Court erred in dismissing the bill of com-

plaint and in denying the complainant the injunctive relief prayed for, for that it appears from the admissions in the pleadings and the facts agreed that said track was placed in Salisbury Street and has remained there under and by virtue of a contract, the obligations of which will be impaired by the enforcement of the ordinance ordering its removal, in violation of Section 10, Article 1, of the Constitution of the United States, which Section and Article were expressly set up and relied upon by the complainant.

6. Because the Court erred in holding that the complainant's claim is based upon the language of an ordinance adopted thirty years ago to meet a temporary condition, for that it appears from the admissions in the pleadings and the facts agreed that the track was constructed for a permanent purpose, that when the track was constructed pursuant to the permission granted in the ordinance of the City of Raleigh, adopted August 5, 1881, it was used as a public track in connection with the cotton compress of complainant in the cotton season and was used for the purpose of loading and unloading freight for the public and for any other purpose for which the railroad company desired to use it.

7. Because the Court erred in holding that the ordinance of the City of Raleigh of August 5, 1881, does not vest in complainant the property right in the use of said side walk for which it contends, and that, if such construction is permissible, the commissioners were not vested by the legislature with the power to make such exclusive, perpetual grant of the sidewalk to the Raleigh & Gaston Railroad Company, which prevents the present governing board, in which the power is vested and upon which the duty is imposed, to control and regulate the use of the sidewalks for the benefit of the public

48 from making and enforcing the ordinance of June 10, 1913, for that the ordinance of August 5, 1881, granted permission to occupy the sidewalk for general railroad purposes in perpetuity and the acceptance of the grant and the expense incurred in the construction of the said track created a valid and binding contract between the City of Raleigh and the Raleigh & Gaston Railroad and its successor, Seaboard Air Line Railway, to maintain its track in the said street in perpetuity, and for that the right to construct and maintain its tracks in the streets of the City of Raleigh was given the Raleigh & Gaston Railroad Company by the act of the legislature of North Carolina, with the assent of the City of Raleigh, and such assent was given by the ordinance of August 5, 1881, and by acquiescence in the occupancy of the sidewalk by the track for all purposes by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, and for that by the acquiescence of the City of Raleigh for more than thirty-one years in the use of said sidewalk by the Raleigh & Gaston Railroad and by its successor, Seaboard Air Line Railway, has created the right to retain said track, which right constitutes a contract and it is not within the power of the governing board of the City of Raleigh to order the removal of the said track, because to do so would impair the obligations of the contract of complainant in violation of the Con-

stitution of the United States, Section 10, Article 1, which was specially set up and relied upon by complainant.

8. Because the said Court erred in holding that the right to occupy the street was not given by the act of the legislature of North Carolina because said act provided that the street occupied by a track must be restored to its former state, for that the statute provides that the company shall restore the street to its former state or to such state as not unnecessarily to have impaired its usefulness, and the said street has been restored to such state as not unnecessarily to have impaired its usefulness, and the portion of the street occupied was expressly designated by the ordinance of Aug. 5, 1881, and such portion of the street has been continuously occupied since the time for
49 general railroad purposes with the knowledge and consent of the municipal authorities until the ordinance of June 10, 1913, was adopted. The facts agreed show that Salisbury Street is 43 feet in width at this point, that there is located on the west side a sidewalk 13 feet in width, and the portion of the sidewalk on the east side occupied by the complainant's track is 10 feet wide, and that the street and the sidewalk on the west side thereof are available to and are used by the public. It further appears that complainant is the sole abutting property owner along the east side of Salisbury Street for the entire length of said track.

9. Because the said Court erred in holding that the City of Raleigh is not estopped to deny that it has given its assent to the occupation of Salisbury Street by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, for that the railroad companies having the right to occupy the street with the assent of the City of Raleigh, and with the knowledge of the proper municipal authorities having proceeded to exercise the right and having constructed, maintained and operated its track in Salisbury Street for general railroad purposes, the City of Raleigh is estopped from asserting that it has not given its assent to such use of the street.

10. Because the Court erred in holding that the assent of the City of Raleigh to the occupancy of said street will not be presumed after the lapse of so many years, and in holding that under the statutory system of North Carolina, this is but a plea of the statute of limitations, for that, as the complainant contended, the assent of the City of Raleigh would be presumed by reason of the occupancy of the street by the railroad for a long period of years for general railroad purposes under such circumstances as to amount to a claim of the right to so occupy it, and for that the City of Raleigh having power to grant the right to occupy the street, such grant is presumed where the right has been exercised for a period of more than twenty years.

11. Because the said Court erred in holding that the ques-
50 tion of whether the usefulness of Salisbury Street is unnecessarily impaired is for determination by the commissioners of the City of Raleigh, and that the wisdom of their action is manifest, for that, it is for the Court to say whether the usefulness of the street is not unnecessarily impaired.

12. Because the Court erred in holding that in the absence of express legislative grant, the terms of which are free from doubt and

ambiguity, the municipal authorities are not authorized to grant to a public utility corporation a franchise to occupy and appropriate the exclusive use of a street or sidewalk to be enjoyed in perpetuity and that said power was not granted to the commissioners of the city of Raleigh by the charter existing at the time of the resolution, or ordinance, giving permission to the Raleigh & Gaston Railroad Company to occupy the sidewalk on Salisbury Street was adopted, August 5th, 1881.

13. Because the decree of the Court is against the law and equity of the case and against the admission and facts agreed.

14. Because in the admissions in the pleadings and the facts agreed, the complainant was entitled to injunctive relief against the enforcement of the ordinance of the city of Raleigh of June 10, 1913, as prayed for in the bill of complaint.

And the complainant tendered the foregoing its bill of exception and asked that it be allowed, signed and sealed, and it is allowed, signed and sealed accordingly.

H. G. CONNOR, *Judge*. [SEAL.]

And now in furtherance of justice and in order that right may be done, the complainant tenders and presents the foregoing as its bill of exceptions to the decree of the Court in this case, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record.

JAMES H. POU,
MURRAY ALLEN,
Counsel for Complainant.

51 Settled, allowed, signed and sealed, this 26th day of December, 1914.

H. G. CONNOR, *Judge*. [SEAL.]

Service Accepted.

Service accepted with copy, this 29th day of December, 1914.

JOHN W. HINSDALE, JR.,
Attorney for Defendants.

52

Filed Dec. 29, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.

THE CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh.

Petition for Appeal.

To the Honorable H. G. Connor, District Judge:

The above named Seaboard Air Line Railway, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 15th day of December, A. D., 1914, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents, upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of him be made.

JAMES H. POU,
MURRAY ALLEN,

Counsel for Seaboard Air Line Railway, Appellant.

53

Filed December 29th, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.

THE CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Order Allowing Appeal.

On motion of Murray Allen, Esq., solicitor and counsel for complainant, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of

the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of \$1,000.00 the same to act as a supersedeas bond also as a bond for costs and damages on appeal.

Dated December 26th, 1914.

H. G. CONNOR,
*District Judge of the District Court of the United States
for the Eastern District of North Carolina.*

54 In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RY., Complainant,

vs.

CITY OF RALEIGH, JAMES I. JOHNSON, etc., Defendants.

Order Restoring Injunction During the Pendency of Appeal.

This cause coming on to be heard this 26th day of December, 1914, upon the application of the Seaboard Air Line Ry. for an appeal to the Supreme Court of the United States, and said appeal having been allowed, it is ordered that the injunction issued in this cause enjoining and restraining the city of Raleigh, James I. Johnson, Mayor and Commissioner, O. G. King and R. B. Seawell, Commissioners of the city of Raleigh from putting into effect an ordinance adopted on the 10th day of June, 1913, relative to the removal of the side track of the Seaboard Air Line Ry., appellant, on the Eastern side of north Salisbury Street, between Jones and Lane Streets in the city of Raleigh, N. C., be restored during the pendency of the appeal, upon the said Seaboard Air Line Ry., appellant, giving bond in the sum of \$1,000.00 and the Clerk, upon the giving of the said bond, is directed to stay the mandate of this court until further order.

It is further ordered that, upon the giving of said bond, the City of Raleigh, and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of the City of Raleigh, defendants herein, their agents and servants and all persons claiming to act under their authority, direction or control, be and they are hereby specially restrained

55 and enjoined from attempting to enforce the ordinance of the City of Raleigh, adopted June 10th, 1913, directing the removal of the track of the complainant, Seaboard Air Line Railway, from the sidewalk on the East side of Salisbury Street between Jones Street and Lane Street in the city of Raleigh, and they are hereby specially restrained and enjoined from removing or attempting to remove said track, and from in any manner hindering or obstructing the Seaboard Air Line Railway, or its agents, servants or employees in the use of said track during the pendency of said appeal.

H. G. CONNOR,
*Judge of the District Court of the United States
for the Eastern District of North Carolina.*

Filed December 29, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

THE CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Assignment of Errors.

The Seaboard Air Line Railway, appellant in the above entitled cause, in connection with its petition for appeal, herein presents and files therewith its assignment of errors, as to which matters and things it says that the decree entered herein on the 15th day of December, 1914, is erroneous, to-wit:

1. Because the United States District Court for the Eastern District of North Carolina erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the ordinance of the City of Raleigh, ordering the removal of the track of the complainant from the street and sidewalk on the east side of north Salisbury Street in the City of Raleigh between Jones and Lane Streets, will impair the obligation of a valid and binding contract between the City of Raleigh and the complainant in violation of Section 10, Article 1, of the Constitution of the United States, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

2. Because the said Court erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the said ordinance will operate as an interference with interstate commerce in violation of the provisions of the Constitution of the United States, Section 8, Article II, conferring upon Congress the power to regulate interstate commerce, and in violation of the acts of Congress passed pursuant to the power so granted, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

3. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that by virtue of its charter and the general laws of the State of North Carolina, the Raleigh & Gaston Railroad Company, predecessor of complainant, had the power, with the assent of the municipal authorities of the City of Raleigh to occupy the sidewalk on the east side of north Salisbury Street between Jones and Lane Streets in the City of Raleigh, for the purpose of running a track thereon, the said power being specifically granted by the acts of the General

Assembly of North Carolina, Session of 1871-2, Chapter 38, Section 29, Sub-section 6, as brought forward and amended by The Code, Sections 1957 and 1982, and Revisal of 1905, Sections 2566 and 2567, as follows:

"Every railroad corporation shall have power: (6) to construct their road across, along or upon any stream of water, water course, street, highway, plankroad, turnpike, or canal, which the route of its road shall intersect or touch, but the company shall restore the stream or water course, street, highway, plankroad and turnpike road thus intersected or touched to its former state or to such state as not unnecessarily to have impaired its usefulness.

Nothing in this act contained shall be construed to authorize the erection of any bridge or other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

That the said track was constructed and has remained in said street and has been maintained pursuant to the powers conferred by the said acts of the General Assembly of North Carolina, with the assent of the City of Raleigh, and the enforcement of the ordinance enacted by the Commissioners of the City of Raleigh ordering the removal of said track will impair the obligation of the contract thereby created in violation of Section 10, Article 1, of the Constitution of the United States, the provisions of which article and section were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

4. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that the lapse of time, more than 31 years during which the said track has been continuously maintained and operated along the said sidewalk has created in the Raleigh & Gaston Railroad Company and its successor and assign, Seaboard Air Line Railway, complainant in this suit, the right to retain said track which right constitutes a contract, subject to the protection of Section 10, Article 1, of the Constitution of the United States, and the enforcement of said ordinance ordering the removal of said track will result in impairing the obligations of said contract in violation of the said provisions of the Constitution of the United States, the protection and benefit of which said Article and Section of the Constitution, the complainant expressly set up and relied upon.

5. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that it appears from the admissions in the pleadings and the facts agreed that said track was placed in Salisbury Street and has remained there under and by virtue of a contract, the obligations of which will be impaired by the enforcement of the ordinance ordering its removal, in violation of Section 10, Article 1, of the Constitution of the United States, which section and Article were expressly set up and relied upon by the complainant.

6. Because the Court erred in holding that the complainant's claim is based upon the language of an ordinance adopted thirty years ago to meet a temporary condition, for that it appears from the admissions in the pleadings and the facts agreed that the track was constructed for a permanent purpose, that when the track was constructed pursuant to the permission granted in the ordinance of the City of Raleigh, adopted August 5, 1881, it was used as a public track in connection with the cotton compress of complainant in the cotton season and was used for the purpose of loading and unloading freight for the public and for any other purposes for which the railroad company desired to use it.

7. Because the Court erred in holding that the ordinance of the City of Raleigh of August 5, 1881, does not vest in complainant the property right in the use of said sidewalk for which it contends, and that, if such construction is permissible, the commissioners were not vested by the legislature with the power to make such exclusive, perpetual grant of the sidewalk to the Raleigh &

60 Gaston Railroad Company, which prevents the present governing board, in which the power is vested and upon which the duty is imposed, to control and regulate the use of the sidewalks for the benefit of the public from making and enforcing the ordinance of June 10, 1913, for that the ordinance of August 5, 1881, granted permission to occupy the sidewalk for general railroad purposes in perpetuity and the acceptance of the grant and the expense incurred in the construction of the said track created a valid and binding contract between the City of Raleigh and the Raleigh & Gaston Railroad and its successor, Seaboard Air Line Railway, to maintain its track in the said street in perpetuity, and for that the right to construct and maintain its tracks in the streets of the City of Raleigh was given the Raleigh & Gaston Railroad Company by the act of the legislature of North Carolina, with the assent of the City of Raleigh, and such assent was given by the ordinance of August 5, 1881, and by acquiescence in the occupancy of the sidewalk by the track for all purposes by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, and for that by the acquiescence of the City of Raleigh for more than thirty-one years in the use of said sidewalk by the Raleigh & Gaston Railroad and by its successor, Seaboard Air Line Railway, has created the right to retain said track, which right constitutes a contract and it is not within the power of the governing board of the City of Raleigh to order the removal of the said track, because to do so would impair the obligations of the contract of complainant in violation of the Constitution of the United States, Section 10, Article 1, which was specially set up and relied upon by complainant.

8. Because the said Court erred in holding that the right to occupy the street was not given by the act of the legislature of North Carolina because said act provided that the street occupied by a track must be restored to its former state, for that the statute provides that the company shall restore the street to its

61 former state or to such state as not unnecessarily to have im-

paired its usefulness, and the said street has been restored to such state as not unnecessarily to have impaired its usefulness, and the portion of the street occupied was expressly designated by the ordinance of August 5, 1881, and such portion of the street has been continuously occupied since the time for general railroad purposes with the knowledge of the municipal authorities until the ordinance of June 10, 1913, was adopted. The facts agreed show that Salisbury Street is 43 feet in width at this point, that there is located on the west side a sidewalk 13 feet in width, and the portion of the sidewalk on the east side occupied by the complainant's track is 10 feet wide, and that the street and the sidewalk on the west side thereof are available to and are used by the public. It further appears that complainant is the sole abutting property owner along the east side of Salisbury Street for the entire length of said track.

9. Because the said Court erred in holding that the City of Raleigh is not estopped to deny that it has given its assent to the occupation of Salisbury Street by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, for that the railroad companies having the right to occupy the street with the assent of the City of Raleigh, and with the knowledge of the proper municipal authorities having proceeded to exercise the right and having constructed, maintained and operated its track in Salisbury Street for general railroad purposes, the City of Raleigh is estopped from asserting that it has not given its assent to such use of the street.

10. Because the Court erred in holding that the assent of the City of Raleigh to the occupancy of said street will not be presumed after the lapse of so many years, and in holding that under the statutory system of North Carolina, this is but a plea of the statute of limitations, for that, as the complainant contended, the
62 assent of the City of Raleigh would be presumed by reason of the occupancy of the street by the railroad for a long period of years for general railroad purposes under such circumstances as to amount to a claim of the right to so occupy it, and for that the City of Raleigh having power to grant the right to occupy the street, such grant is presumed where the right has been exercised for a period of more than twenty years.

11. Because the said Court erred in holding that the question of whether the usefulness of Salisbury Street is unnecessarily impaired is for determination by the commissioners of the City of Raleigh, and that the wisdom of their action is manifest, for that, it is for the Court to say whether the usefulness of the street is not unnecessarily impaired.

12. Because the Court erred in holding that in the absence of express legislative grant, the terms of which are free from doubt and ambiguity, the municipal authorities are not authorized to grant to a public utility corporation a franchise to occupy and appropriate the exclusive use of a street or sidewalk to be enjoyed in perpetuity and that said power was not granted to the commissioners of the City of Raleigh by the charter existing at the time of the resolution, or ordinance, giving permission to the Raleigh & Gaston Railroad

Company to occupy the sidewalk on Salisbury Street was adopted, August 5, 1881.

13. Because the decree of the Court is against the law and equity of the case and against the admissions and facts agreed.

14. Because in the admissions in the pleadings and the facts agreed, the complainant was entitled to injunctive relief against the enforcement of the ordinance of the City of Raleigh of June 10, 1913, as prayed for in the bill of complaint.

63 Wherefore, the complainant, Seaboard Air Line Railway, prays that the said judgment and decree of the United States District Court for the Eastern District of North Carolina dismissing the bill of complaint in this suit and denying the complainant the injunctive relief prayed for, be reversed and that the said Court may be directed to enter a decree granting to the complainant a permanent injunction as prayed for in the bill of complaint.

JAMES H. POU,
MURRAY ALLEN,

Counsel for Seaboard Air Line Railway, Appellant.

Endorsement of Acceptance of Service.

Service accepted with copies, this 29th day of December, 1914.

JOHN W. HINSDALE, JR.,
Attorney for Defendants, Appellees.

64

Filed December 29th, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

THE CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and
R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Bond.

Know all men by these presents, that we, Seaboard Air Line Railway, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners in the sum of \$1,000.00 lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors and assigns by these presents.

Sealed with our seal- and dated this 26th day of December, 1914.
Whereas the above named Seaboard Air Line Railway has proce-

65 euted an appeal to the Supreme Court of the United States to reverse the judgment of the District Court for the Eastern District of North Carolina, in the above entitled cause, and whereas the said City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of the City of Raleigh, have been restrained and enjoined from attempting to enforce the ordinance of the City of Raleigh adopted June 10th, 1913, directing the removal of the track of the Seaboard Air Line Railway from the sidewalk on the East side of Salisbury Street between Jones Street and Lane Street in the City of Raleigh, and have been restrained and enjoined from removing or attempting to remove said track, and from in any manner hindering or obstructing the Seaboard Air Line Railway in the use of said track during the pendency of said appeal.

Now therefore, the condition of this obligation is such, that if the above named Seaboard Air Line Railway shall prosecute its said appeal to effect and answer all costs and damages that may be adjudged against it if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN, *Attorney.*

FIDELITY & DEPOSIT COMPANY OF MARY-
LAND, [SEAL.]
By JOS. B. CHESHIRE, JR., *Attorney in Fact.*
J. L. SKINNER, *Agent.*

Bond satisfactory.

JOHN W. HINSDALE, JR.,
Attorney for Defendants, Appellees.

Bond approved and to act as supersedeas this 26th day of December, 1914.

H. G. CONNOR,
*District Judge of the United States District
Court for the Eastern District of North
Carolina.*

66

Filed December 29th, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,

VS.

THE CITY OF RALEIGH, JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Citation.

UNITED STATES OF AMERICA, ss:

To City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of City of Raleigh, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to an order allowing an appeal filed and entered December 29th, 1914, in the clerk's office of the District Court of the United States for the Eastern District of North Carolina from a final decree signed, filed and entered on the 15th day of December, 1914, in that certain suit, being in equity No. 354, wherein Seaboard Air Line Railway is complainant, and appellant, and you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. G. Connor, District Judge of the
67 United States District Court for the Eastern District of North Carolina, this 26th day of December, 1914, and of the Independence of the United States, One hundred and thirty-eight.

H. G. CONNOR,

District Judge of the District Court of the United States for the Eastern District of North Carolina.

I, John W. Hinsdale, Jr., Attorney and Counsel of Record for City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of City of Raleigh, defendants and appellees in above entitled suit, hereby acknowledge due service of the above citation with copies of same and copies of petition for appeal, assignments of error, order allowing appeal, order restoring injunction pending appeal, bond and bill of exceptions.

This 28th day of December, 1914.

JOHN W. HINSDALE, JR.,

Attorney for Above-named Defendants, Appellees.

68 In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Order Designating Record to be Sent to United States Supreme Court.

By consent of counsel the court hereby orders and directs that the following shall constitute the record in the above entitled suit to be sent to the United States Supreme Court, and to be printed in the transcript of record for use in the said United States Supreme Court, to-wit:

The Bill of Complaint, Marshall's Return, the Prosecution Bond, Equity Sub-pœna with Marshall's return, Notice to Defendants with Marshall's Return, Injunction until Hearing with Marshall's Return, Agreement of Solicitors as to Hearing, Order Continuing Injunction, Answer, Facts Agreed, Additional Facts Agreed, Opinion of the Court, Final Decree, Bill of Exceptions with Acceptance of Service, Petition for Appeal, Order Allowing Appeal, Order Restoring Injunction Pending Appeal, Assignment of Errors, Endorsement of Acceptance of Service, Bond, Citation with Acceptance of Service and this Order.

H. G. CONNOR,

*Judge of the District Court of the United States
for the Eastern District of North Carolina.*

Consent:

JOHN W. HINSDALE, JR.,

Counsel for Complainant.

MURRAY ALLEN,

Counsel for Defendants.

69 SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Order to Transmit Record.

And thereupon it is ordered by the Court here that a transcript of the record and proceedings in said suit, be transmitted to the United States Supreme Court at Washington, D. C., and the same is transmitted accordingly.

ALEX. L. BLOW,

*Clerk United States District Court,
Eastern District of North Carolina.*

Clerk's Certificate.

UNITED STATES,

Eastern District of North Carolina:

I, Alexander L. Blow, Clerk, United States District Court for the Eastern District of North Carolina, do hereby certify that the foregoing sixty-eight (68) pages present a true, full and correct copy of the proceedings had, and orders entered in that certain suit in equity pending in said Court, wherein Seaboard Air Line Railway is complainant and City of Raleigh and James I. Johnson, O. G. King, and R. B. Seawell, Commissioners of City of Raleigh, are defendants.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said District Court at the courthouse in Raleigh, State of North Carolina, this 18th day of January, 1915.

[Seal United States District Court, Eastern Dist. of N. C.,
at Raleigh.]

ALEX. L. BLOW,
Clerk U. S. District Court.

Endorsed on cover: File No. 24,524. E. North Carolina D. C. U. S. Term No. 330. Seaboard Air Line Railway, appellant, vs. The City of Raleigh and James I. Johnson, O. G. King, and R. B. Seawell, commissioners of the city of Raleigh. Filed January 20th, 1915. File No. 24,524.

